Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 1 2 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Mari Johnson

S Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a physician specializing in nephrology (the field of medicine related to the kidney). At the time he filed the petition, the petitioner was a fellow at Saint Louis University (SLU) Hospital, St. Louis, Missouri. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a statement from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on July 1, 2009. In a statement submitted with the initial filing, counsel contended that the petitioner

> should not be required to go through the labor certification process, because this process is not able to take into consideration the unique skills that he has developed as a clinician

> and diagnostician, the tremendous national impact of the research work that is done, and the reputation that [he] has sustained amongst his peers nationally.

Elsewhere in the same statement, counsel claimed that the petitioner

> is an outstanding nephrologist at the top of his field with extraordinary abilities and talents which he has illustrated time and again through his significant work. Additionally, the support letters written on [the petitioner's] behalf show that [the petitioner] is one of the most talented nephrologists in the field nationally.

We will consider the witness letters elsewhere in this decision. All of these assertions, and others in the record, contain claims of objective fact, for which the petitioner must provide impartial evidentiary support. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

With respect to the petitioner's asserted expertise in nephrology, we refer to the petitioner's own *curriculum vitae*. The petitioner stated that his experience began with service on the house staff of [redacted] The petitioner referred to this period as "three years of training." The petitioner indicated that he served rotations in "general medicine," "intensive care unit," "cardiac care unit," "hematology and oncology," "neurology," "continuity clinic" and "ambulatory clinic." The petitioner briefly mentioned "kidney disease" in the context of a list of ailments, but did not claim that he served a rotation in nephrology or received any specialized training in that specialty. The petitioner's professional experience in nephrology appears to have begun in 2008, when he began his nephrology fellowship at SLU Hospital. As with his house staff service at St. Luke's Hospital, the petitioner referred to his fellowship as an "opportunity [for] getting trained."

The petitioner submitted background information regarding a claimed shortage of nephrologists. A shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification. *See Matter of New York State Dept. of Transportation* at 215, 218. There exists a statutory provision at section 203(b)(2)(B)(ii) of the Act for certain physicians when the Department of Health and Human Services has officially designated a shortage area, but the petitioner has made no attempt to follow the provisions set forth in that subsection of the Act, or to conform to the corresponding regulatory requirements at 8 C.F.R. § 204.12.

The record contains five witness letters written in support of the petition in June 2009. Counsel stated that the letters are "from top experts in the fields from different parts of the country and the world." Only one witness is based outside of St. Louis, and all of the witnesses are based in the United States. The range of witnesses, therefore, does not lend support to the claim that the petitioner has earned a wider reputation. The wording of the letters – replete with claims that the petitioner is one of the nation's top nephrologists – indicates that they were originally written to support another petition, in

which the petitioner sought classification as an alien of extraordinary ability. That petition, with receipt number [redacted], was filed simultaneously with the present petition and denied on August 21, 2009. There is no record of an appeal of that denial.

Three of the four St. Louis-based witnesses are on the SLU faculty. Professor [redacted] director of the Division of Nephrology in SLU's Department of Internal Medicine, stated:

> [The petitioner] has distinguished himself as an extremely talented physician. He came to our program highly recommended [by] colleagues in the field and has lived up to those recommendations. . . .
>
> [The petitioner] has an excellent fund of knowledge, which is growing rapidly. He takes excellent care of patients. . . . He has an excellent reputation as a teacher. . . . In addition, he has participated in our interventional nephrology program . . . and has become adept at all of the procedures in this discipline. . . .
>
> [The petitioner] has excelled at clinical and diagnostic applications of nephrology and contributes to active research in the field, which has resulted in several important publications, even at this stage of his career.

Dr. [redacted] an associate professor of internal medicine, biochemistry and molecular biology at SLU, is also a staff physician and chief of nephrology at the St. Louis Veterans Affairs Medical Center. He stated:

> [The petitioner] is a highly skilled and competent clinician with excellent clinical judgment and expertise in the management of complex diseases of the kidney. During his training he has acquired the ability to manage patients with end stage renal disease that require dialysis and transplantation. He is also highly adept in managing critically ill veterans in the intensive care unit with acute kidney failure who require state of the art continuous dialysis therapies that are only performed in a select number of tertiary care institutions in the country. In addition to these sophisticated skills, [the petitioner] has acquired expertise in performing interventional nephrology procedures for vascular access management. . . . [F]ewer tha[n] four percent of kidney specialists are trained to perform these critical interventions. . .
>
> Another important measure [of the petitioner's] outstanding qualification in this field is his success as a clinical teacher and researcher. His excellent teaching and supervision of medical students and resident physicians has contributed significantly to the training of future physicians in the United States. He has also demonstrated excellence as a nephrology researcher. He has been invited to present his findings at national and international meetings and was recognized for his accomplishments by being the recipient of several travel awards.

Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dept. of Transportation* at 221. Also, the record contains no evidence to show that the petitioner's travel awards amounted to "recogni[tion] for his accomplishments" rather than a routine form of financial aid.

The two letters quoted above consist mainly of restrained praise for the petitioner as a competent practitioner in his field. Other letters contain more extravagant claims regarding the petitioner's achievements and, particularly, his reputation. SLU Professor [redacted] stated:

> [The petitioner] is one of the most skilled nephrologists in the field today. . . . He has gained widespread recognition in the medical community for his treatment of patients suffering from a wide array of ailments. . . .
>
> Many physicians limit their work to a small, limited clinical field; others focus on research, teaching or administrative pursuits. [The petitioner] is one of a select group of physicians with experience in all of these areas, achieving a unique reputation for versatility bestowed upon only the best in the field. . . . [The petitioner's] research . . . focused on the potential role of extracellular calcium in the regulation of adrenal hormone secretion . . . is among the most important in all of medicine.

Professor [redacted] of Washington University School of Medicine in St. Louis stated:

> I write this letter as a strong testament to the exceptional abilities of [the petitioner] as an alien of extraordinary ability at the vanguard of his field. . . . [H]e is truly one of the foremost nephrologists in the country today.
>
> [The petitioner] has achieved an extraordinary level of expertise as a physician that is rare in the U.S. medical community today. He has distinguished himself by being awarded leading roles at the country's top medical institutions. . . .
>
> No field of medicine is more difficult to appreciate, and yet so absolutely vital, as nephrology. Only the foremost physicians are able to dedicate themselves to such a difficult field, and very few are able to master it as [the petitioner] has done. . . . [T]here is a dearth of nephrologists in the United States today, and an even bigger shortage of nephrologists with expertise in diabetes treatment and end stage renal disease, like [the petitioner].
>
> [The petitioner] is not only an extraordinary practitioner of nephrology, but he has also developed an expert reputation for his stellar teaching. . . . [The petitioner] is one of the elite nephrologists who has the extraordinary ability to diagnose the most complex conditions, even when other, more senior physicians, have failed to do so.

Considering the nature of claims such as the above, it is not only reasonable but necessary to expect strong and specific documentary evidence in support of such claims. It cannot suffice to point to a particular medical procedure or conference presentation and declare it to be beyond the capabilities of most nephrologists. The assertion that the petitioner was already "one of the foremost nephrologists in the country," even before he completed his training in that specialty, strains credulity. Claims regarding the petitioner's national prominence carry significantly less weight when nearly all such claims are from St. Louis, where the petitioner practices.

The only witness outside of St. Louis is Professor [redacted] of the University of Arizona, who stated:

> [The petitioner] is one of the top nephrologists in the United States who has performed the most complex and cutting-edge procedures in the field to a degree unrivaled by the vast majority of his peers.
>
> I would estimate that [the petitioner] has attained a degree of expertise unmatched by even four percent of the most senior physicians in the field of nephrology. . . . He has played a leading role in important research studies that have been selected for publication and presentation at forums boasting international audiences. . . .
>
> [The petitioner] has distinguished himself in the field by demonstrating an uncanny ability to perform the most innovative diagnostic and treatment procedures related to nephrology.

For the most part, Prof. [redacted] offered general assertions rather than specific examples. The only parts of his letter to contain specific details are a list of maladies that he treats (such as "end stage renal disease, diabetes, [and] hypertension") and the assertion that the petitioner "specializes in microscopic examination of urine, dialysis catheter placements . . . and kidney biopsy."

We note that, while the petitioner presented Prof. [redacted] as an independent witness, he cites the same "four percent" figure also found in Dr. [redacted]'s letter. Neither witness provided a source for this apparently arbitrary figure.

The opinions of experts in the field are not without weight and we have considered them above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as we have done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable.

Id. at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

The letters considered above primarily contain bare assertions of widespread recognition and vague claims of contributions without specifically identifying contributions and providing specific examples of how those contributions have influenced the field. The petitioner did not submit letters from independent references who affirm their own reliance on the petitioner's work or who were even simply familiar with his work through his reputation. The petitioner also failed to submit corroborating evidence in existence prior to the preparation of the petition, which could have bolstered the weight of the reference letters.

A section of the petitioner's initial submission bears the title "Selective and competitive honors and awards, memberships." The first exhibit is a letter from Dr. [redacted] program director of residency in medicine at St. Luke's Hospital, indicating that the petitioner received four travel grants, worth between $200 and $500 each, between September 2005 and April 2008. The letter does not reveal the standards or requirements that one must meet to receive such grants. Therefore, there is no evidence that these grants are "honors and awards" rather than routine financial assistance for pursuit of educational activities.

The same can be said of an "educational stipend of $500 to assist with attending the National Kidney Foundation's 2009 Spring Clinical Meetings," described in a letter from that foundation. In addition to the reference to an "educational stipend," another sign that the foundation considered the petitioner to be a trainee is the assertion, near the end of the letter, that "your next step in advancement is seeking employment."

The next item identified as an honor, award or membership is a "Rank Card of EAMCET," which listed the following information:

	Biology	Chemistry	Physics	Total	Rank
Maximum	100	50	50	200	
Marks Secured	091.25	046.25	047.50	185.00	205

This card appears to be a report card, showing the petitioner's course grades or test scores and class rank. Counsel did not explain how this document constitutes an honor, award, or membership.

None of the documents listed above appears to represent an honor or award. If these materials are the best available evidence of the petitioner's claimed standing in the field of nephrology, then we must consider that claim to be highly exaggerated.

Finally, the petitioner submitted certificates of membership in the American Medical Association, the American Public Health Association, and the American Society of Nephrology. The petitioner submitted information about only the last of these associations. According to documentation in the record, "The American Society of Nephrology (ASN) is the world's largest organization dedicated to

the study and practice of nephrology." The petitioner did not explain how membership in an organization that accepts more members than any other in the field is a mark of distinction.

In a section of the record marked "Material about the alien," the petitioner noted that he is "[l]isted in the acknowledgements section of [an] article" published in *Kidney & Blood Pressure Research.* The petitioner was one of eleven people whom the authors thanked "for their technical expertise." The petitioner also noted that his name appears in what appear to be physician directories, and he asserted: "My response to a clinical question was mentioned" in an online article. That article consisted of a "Case Vignette," followed by the question: "Given your knowledge of the condition and the points made by the experts, which treatment approach would you choose?" There then follow brief comments from several dozen respondents, including the petitioner. This appears to be similar to innumerable web sites that permit readers to post comments relating to articles or other content on those sites.

The petitioner appears to have submitted the above materials in an attempt to show that his work has attracted media attention. The materials, however, establish little except that the petitioner has been professionally active in his field.

On August 21, 2009, the director issued a request for evidence, stating that the record shows the petitioner has "done some fine research work and patient care," but not that the petitioner "will present a benefit so great as to outweigh the national interest inherent in the labor certification process." The director also noted that the petitioner had submitted evidence of published research, but had not submitted citation data to show that others in the field have relied upon that research.

In response, the petitioner submitted a printout from Google Scholar (http://scholar.google.com), showing seven results. The petitioner did not, however, limit the search to articles that identify him as an author. He simply searched for articles that contain both his first name and his surname, not necessarily together. Because of this broad search, four of the results do not refer to the petitioner at all; they coincidentally contained those two names in reference to other people. Two of the remaining three results refer to articles by the petitioner, but do not refer to any citations of those articles.

The last remaining result of the Google Scholar search refers to an article with seven citations. The petitioner, however, is not an author of the cited article. Rather, the petitioner is one of at least six individuals whom the authors acknowledged "for their technical expertise." Citations of that article cannot reasonably be called citations of the petitioner's work.

The petitioner submitted letters from officials of various scholarly journals, attesting to statistical information about those journals. The officials did not comment on the content or impact of the petitioner's work that had appeared in those journals.

The petitioner submitted what he described as a "Letter explaining [the] impact of [his] previous work." In this letter, the petitioner indicated that he participated in the "conversion of 11 videodiscs (each of which contained an instructional video segment and hundreds of images of pathology for training medical students in fundamentals of pathology) to a World Wide Web-delivered system using a process

for automated digital conversion of videodisc resources." The petitioner did not claim to have developed any of the video content. He claimed only to have helped to convert the format of existing materials. The petitioner also stated that he "created a digital library" of images, some of which have since been used for test preparation materials. The petitioner did not describe the nature of these images or his role in creating them (as opposed to making existing materials available online). We note that the petitioner performed this work while he was a graduate student at the University of Alabama. The descriptions of the materials do not mention nephrology, the specialty in which he is said to have earned widespread renown.

Under the heading "Independent testimonials evidencing importance of research work," the petitioner submitted several witness letters. All but one of these letters are previously written letters from individuals in St. Louis. The exception is a September 21, 2009 letter from Dr. [redacted], emeritus professor at Mayo Clinic College of Medicine, Rochester, Minnesota. Dr. [redacted] did not claim to be an independent witness, as the petitioner has claimed. Rather, he stated:

> I have worked with [the petitioner] informally giving him advice on a patient of mutual interest in our specialty. . . .
>
> [The petitioner] has done a basic science project while at the University of Alabama in which he performed a meaningful study . . . in an attempt to find the cause of IgA neuropathy. . . . Therefore, [the petitioner's] work has contributed to a better understanding of this common disease.

After identifying "a number of other important studies," Dr. [redacted] stated that the petitioner "is dedicated to these ongoing worthwhile clinical research projects as he continues his training in clinical nephrology demonstrating his dedication to becoming a well-rounded physician in renal medicine." This last sentence shows that Dr. [redacted] does not consider the petitioner to be a fully-trained physician, an opinion confirmed by his next sentence: "I believe [the petitioner] deserves permanent visa status to complete his training so he may become a viable contributing member of the medical profession in our country."

The director denied the petition on October 19, 2009, stating that the petitioner failed to establish that he is eligible for the national interest waiver. The director acknowledged the petitioner's submission of several witness letters, but found that the record did not contain objective, documentary evidence to support the witnesses' claims.

On appeal, counsel asserts: "The record indicates that his skills are so unique that it would not be fair to exempt hi[m] from the labor certification process" (*sic*). Presumably counsel means that it would not be fair *not* to exempt him. Counsel does not explain what in the record supports this conclusion. The vast bulk of the record appears to be little more than the standard work product of a physician/researcher, and such evidence cannot make up in volume what it lacks in significance.

Counsel states that the petitioner is "able to master many of the most advanced procedures in the field and also to teach those procedures to peers, both junior and senior, thereby creating a ripple effect." The petitioner does not claim to have developed or refined these "advanced procedures" (which counsel does not identify specifically). We have already explained that simply learning an existing procedure is not grounds for a waiver. The argument is simply that, having learned the procedures himself, the petitioner can now teach them to others. Counsel does not explain how this distinguishes the petitioner from countless other medical students who, like the petitioner, take on some teaching duties even while completing their own professional training. Also, by counsel's logic, the credit could just as easily go to the petitioner's teachers as to the petitioner himself.

Counsel claims that the petitioner "possesses . . . abilities that cannot be easily articulated by objective factors appearing in the labor certification process, but that can only be subjectively observed and respected by fellow physicians." As we have already noted, when we compare those letters to the objective evidence in the record, the claims in the letters are so inflated as to be unrealistic. Many of the letters contain the claim that the petitioner is one of the greatest nephrologists in the entire United States, but this reputation appears to have been completely unreported until the petitioner asked witnesses, mostly in St. Louis, for letters on his behalf.

Counsel states: "we are again providing a summary of [the petitioner's] accomplishments in various relevant categories that demonstrate the national impact that his work has had." We can find no such summary in the record.

The objective evidence of record portrays the petitioner as an active and skilled physician, pursuing ongoing professional training in nephrology. The record does not support the exaggerated claims of counsel and a handful of witnesses attesting to an alleged national reputation and widespread, yet ill-defined, impact in his specialty. We see no credible evidence in the record that would lead us to question the director's findings. We therefore agree with the director's decision to deny the petition.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.